IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1094 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PUNMBHAI SABURBHAI ZHALA ...Appellant
(original accused)
Versus
STATE OF GUJARAT (Respondent)

Appearance:
1. Criminal Appeal No. 1094 of 1997
MR PM VYAS for the Appellant
Mr.K.G.Sheth Addl. PUBLIC PROSECUTOR for the Respondent

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 25/07/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. The appellant challenges the judgment and order dated 24th October, 1997 of the learned Additional Sessions Judge, Sabarkantha camping at Modasa in Sessions Case no. 122 of 1995 convicting the appellant-accused for the offence under Sec. 302 of the Indian Penal Code and sentencing him to imprisonment for life and payment of fine of Rs.5,000/- in default of which to undergo simple imprisonment for a further period of one year.

2. The prosecution case was that the appellant-accused Punambhai was suspecting that Parvatbhai Bhalaji Nayak was having illicit relations with his wife Kashi and therefore on 10th August, 1995 at about 1.30 p.m. in the outskirts of village Vatrak, the accused gave blows to Parvatbhai on his head with a wooden leg of a cot (ees) and caused his death.

3. The trial court, on the basis of the evidence on record, came to a finding that the death of Parvatbhai was homicidal and that the accused had on 10th August, 1995 at 1.30 p.m. given blows with a wooden leg of a cot on the head of Parvatbhai with the intention of causing his death or with the intention of causing an injury which was likely to cause his death or was sufficient in the ordinary course of nature to cause his death. The accused was, therefore, convicted for the offence under Sec. 302 of the Indian Penal Code and sentenced to life imprisonment.

4. Dr. Mehul Patel, in his deposition exh. 29, has stated that on 10th August, 1995 Parvatbhai was brought to Vatrak hospital at 2.45 p.m. and was treated by Dr.Uday Patel who had gone abroad, when his deposition was recorded. He has proved the medical certificate exh. 30 in which it was noted that the patient was unconscious and there were following injuries on him :

1) C.L.W. about 3 x 1 x 1 to 1.5 cm. over left parieto-occipital region.
2) C.L.W. about 1 x 1 x 1 to 1.5 cm. near the above C.L.W.
3) Swelling (oedema) over the affected area.
4) Swelling over left sternomastoid region.
5) Gross oedema over left parieto-occipital region.
6) Blackening of left upper eyelid.
7) Bleeding from left ear.

It was noted that the patient was unconscious and did not respond to painful stimuli and that bloody froth was coming out from his mouth. Dr.Mehul Patel, in his deposition, has stated that as per X-ray and Radiologist report exh. 31, there was a fracture in the skull of this patient.

4.1. Dr.Ishwarbhai Patel, who had performed the post-mortem on the dead body of Parvat has proved the post-mortem Report at exh. 12 in Clause-17 of which the external injuries have been enumerated as under :

1. Contused Lacerated Wound (C.L.W.) 1.5" x 1/2" x scalp deep oblique in direction Antro-posterior at left parieto-occipital region at head.
2. A Contused Lacerated Wound (C.L.W.) of 2" x 1/2" x scalp deep oblique in direction Antro-posterior direction 2" parallel to No. (1) injury at left parieto-occipital region.
3. Bleeding from mouth and nose
4. Contusion at left side of forehead & left eyelid 2" x 3"

According to this medical expert, these injuries were sufficient in the ordinary course of nature to cause death. He stated that these injuries were possible by inflicting blows with muddammal article no. 6, which was the wooden leg of a cot ("ees"). This doctor has denied the suggestion that such injuries would be possible by a fall.

4.2. The medical evidence, therefore, satisfactorily establishes that the death of Parvatbhai was caused because of blows being given by hard and blunt substance on his head and that the cause of his death was shock and hemorrhage due to head injury and subdural hemorrhage as noted in the post-report exh. 12 and the certificate of cause of death exh. 13.

5. The complainant Shantaben Bhalabhai who was the mother of the deceased had not witnessed the incident but has stated in her deposition exh. 9 that when she was returning to her house from Vatrak after buying medicines, she had seen her son Parvat lying unconscious. She was told that the accused Punambhai had beaten him. She had seen that Parvat was having injuries on his head. She had lodged F.I.R. exh. 10. According to her, Punam had assaulted her son Parvat because he suspected him to be having an affair with his wife. In her cross-examination, she has stated that her son Parvat did not have any illicit relations with wife of Punam. It

will be seen that in the F.I.R. exh. 10 lodged on the same day soon after the incident, the name of the accused was disclosed as the assailant and it was stated that at about 1.30 p.m. when Parvatbhai and Kashiben-wife of Punambhai and her daughter Manjula were coming from Vatrak towards the quarry and Punam saw them, he had an exchange of words with his wife Kashiben whom he questioned as to why did she come with Parvat. Thereupon, Kashi called Parvat and told him to tell her husband that he had met her only on their way to Vatrak and that there was no other reason. Therefore, Parvat went to Punam to explain but there was an altercation between them and Punam picked up a wooden leg of a cot and gave blows on the head and neck of Parvat who fell down. Thereafter, Punam went away and Parvat was taken to Vatrak hospital.

6. The prosecution witness Punjabhai Chauhan in his deposition exh. 15 has stated that his house is near Harihar quarry and the houses of the labourers working in Harihar quarry were also near his house. The room in which the accused resided was near the house of this witness. As per the map exh. 36, it was at a distance of about 35 ft. away from his house. This witness knew Punam's wife but did not know her name. On the day of the incident (it was a Rakshabandan day), his son Ramesh and his daughter-in-law Shantaben were in the house and this witness was returning from their plant to the house. When he was at his plant, there was an altercation between the accused and Parvat. He has stated that the accused had picked up a wooden leg of a cot and hit it on the head of Parvat. He has asserted that he had seen the blow being given and identified the muddammal article no.6 as the same "ees" with which the blow was given. In his cross-examination, he has maintained that he had witnessed the blow being given to Parvat by the accused.

7. The prosecution witness Rameshbhai Chauhan, who is an eye witness has, in his deposition exh. 17 stated that the incident had occurred on the Rakshabandan Day due to which the quarry was closed. He and his wife were at their house at 1 p.m. The labourers were residing in the quarters near their house. He has named Punam (i.e. accused), Shankarji, Mangaji and deceased Parvat as the persons whe were residing nearby his house. According to him, at 1 p.m., Punambhai had come near their house and was sitting near a tamarind tree. At about 1.30 p.m., Punambhai's wife Kashiben was returning from the bazaar with flour. She was accompanied by her daughter. Parvat was also coming with her. Punam saw these three coming together. Thereafter, there was an exchange of words

between him and his wife Kashiben. Punam questioned her as to why did she come with Parvat. Kashiben, therefore, went and called Parvat and told him that because of him her husband was beating her. Thereafter, there was a fight between the accused and Parvatbhai. They were grappling and had slapped each other. According to this witness, he had seen this incident when he was outside his house. His wife Shantaben was also seeing the incident. This witness, thereupon, proceeded towards the accused and Parvat to separate them. When he was about 10 to 15 ft. away from them, the accused picked up a wooden leg of a cot (ees) and gave a blow on the left side of the head of Parvatbhai, as a result of which Parvat fell down. The accused gave two more blows with the "ees" on the head of Parvatbhai and thereafter he ran away. Parvatbhai started bleeding from his head. He was, thereafter, taken to Vatrak Government Hospital in a tractor, where he was given primary treatment and was advised to be taken to Civil Hospital, Ahmedabad. While proceeding towards Ahmedabad, Parvat died near Dehgam. According to this witness, the accused was suspecting that Parvatbhai was having illicit relations with his wife and therefore he had beaten him. In his cross-examination, he has maintained that the accused and his wife were quarreling because of the alleged illicit relations. He has maintained in the cross-examination that he had seen the accused and Parvat grappling with each other and that he had seen the incident from a distance of 10 to 15 ft. The presence of this witness at his house on the Rakshabandan day on which his quarry was closed was but natural. There was no reason for this witness to falsely implicate the accused. The accused and his wife were residing very near his house and there is nothing unusual, if he came to know about the quarrel over the suspected illicit relationship. His version that the accused had given a severe blow on the left side of the head of Parvat with the "ees" and after Parvat fell down, he gave two further blows on his head is amply borne out from the medical evidence as noted above.

8. The deposition of Shardaben, wife of Rameshbhai who was also the eye witness, is on the same lines. She has stated that she was sitting with her husband at about 1.30 p.m. outside their house. When Parvat, Kashiben and Manjula (Kashi's daughter) were coming from Vatrak, on seeing these three persons together, Punam had questioned his wife as to why did she come along with Parvat. His wife Kashi, therefore, called Parvat. This had happened opposite the house of this witness. She had stated that the house of the accused was just opposite her house. There was a quarrel between the accused and

Parvatbhai and they started fighting and were slapping each other. Her husband proceeded to separate them but in the meantime, the accused gave a blow with the "ees" of a cot on the head of Parvat who fell down. The accused gave him further blows even after he fell down and thereafter ran away. In the cross-examination, she has maintained the aforesaid version which appears to be reliable and trustworthy.

9. The inquest panchanama and the medical evidence clearly support the story of these witnesses that the accused had given the blows with "ees" of a cot on the head of Parvat as a result of which he fell down and started bleeding from his head. The medical evidence shows that there was a fracture in the skull and two contused lacerated wounds and a contusion were noted in the post-mortem report, in addition to bleeding from the nose and mouth of the deceased.

10. From the above oral and documentary evidence, we are fully satisfied that on 10th August, 1995 which was a Rakshabandan day, at about 1.30 p.m. Punambhai-the accused, suspecting that Parvat was having an affair with his wife Kashiben quarrelled with Parvatbhai and picked up a wooden leg of a cot and gave blows with it on the head of Parvat with great force which resulted in the fracture on the skull and the aforesaid external and internal injuries as noted in the post-mortem notes and the medical certificate which were sufficient in the ordinary course of nature to cause death of Parvatbhai. Parvatbhai had become immediately unconscious when the accused gave him a blow on his head. The accused gave two more blows on his head, even after Parvat fell down. It is, therefore, clear that the blows were inflicted by the accused on the head of Parvatbhai with the intention of causing his death. On this basis the appellant has been convicted for the offence under Sec. 302 of the Indian Penal Code by the trial court. However, in our opinion the trial court has over-looked that part of the evidence which attracts the provisions of Exception 4 to the definition of murder under Sec. 300 which provides that culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offenders having taken undue advantage or acted in a cruel and unusual manner. It is immaterial in such cases which party offers the provocation or commits the first assault as per the explanation to the said Exception 4. In the present case, as noted above, both the eye witnesses Rameshbhai and Shantaben, in their depositions exhs. 17 & 18, have in terms stated that they had seen the accused

and Parvatbhai quarreling and thereafter fighting. They were grappling and giving slaps to each other. It is obvious that this incident had suddenly occurred, because, at 1.30 p.m. when the accused Punam noticed that his wife was coming alongwith Parvat, he had quarrelled with her and she, therefore, went and called Parvatbhai to explain to him that he had only met her on their way. At that time, both of them quarrelled and there was a fight between them. It is, therefore, clear that the offence was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel. The matter, therefore, in our opinion squarely falls within the purview of Exception 4 to Sec. 300 of the Indian Penal Code. After giving two or three blows with the wooden "ees", the accused ran away and therefore he did not act in a cruel or unusual manner contemplated in the said Exception 4. In our opinion, therefore, the trial court committed an error in convicting the appellant-accused for the offence under Sec. 302 of Indian Penal Code instead of convicting him under Sec. 304-I of the Indian Penal Code. We, accordingly pass the following order :

O R D E R

The appeal is partly allowed and the conviction of the appellant-accused Punambhai Saburbhai Zhala is altered from Sec. 302 of the Indian Penal to Sec. 304 Part I of the Indian Penal Code and the sentence of life imprisonment and fine imposed by the trial court are set aside and we impose on the appellant-accused Punambhai Saburbhai Zhala, a sentence of rigorous imprisonment for a period of ten years and a fine of Rs.1,000/- in default of the payment of which to undergo simple imprisonment for a period of one month, for the offence under Sec. 304 part I of the Indian Penal Code.

(R.K.ABICHANDANI, J)

(SHARAD D DAVE, J)

srilatha